

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**ARTHUR J. LEARY,**

***Plaintiff***

**v.**

**JOHN H. DALTON,  
*Secretary of the Navy***

***Defendant***

***Civil No. 93-269-P-C***

***RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS AND/OR  
FOR SUMMARY JUDGMENT***

The plaintiff in this action seeks relief under the Rehabilitation Act of 1973, 29 U.S.C. ' 791 *et seq.*, alleging that the Navy improperly discharged him from his civilian job at the Portsmouth Naval Shipyard because of a disability. The Defendant moves for a dismissal of the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted; in the alternative, the Defendant seeks summary judgment pursuant to Fed. R. Civ. P. 56. Because I agree with the Defendant that the submissions of the parties reveal no genuine issue of material fact and that the Defendant is entitled to a judgment as a matter of law, I recommend the granting of the Defendant's summary judgment motion.

**I. Summary Judgment Standards**

When, as here, a motion to dismiss for failure to state a claim is supported by matters outside the pleadings and those matters are not excluded by the court, the motion is to be treated as one for summary judgment and disposed of in accordance with Rule 56. Fed. R. Civ. P. 12(b). Summary judgment is appropriate only if ``the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). "Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial." *Id.* at 73 (citations omitted); Fed. R. Civ. P. 56(e); Local Rule 19(b)(2). A fact is "material" if it may affect the outcome of the case; a dispute is "genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

## II. Facts

The plaintiff was employed prior to his termination as a WG-10 electrician in Shop 97 of the Portsmouth Naval Shipyard. Complaint, ¶ 6; Answer ¶ 6. On August 26, 1989, while not on duty, the plaintiff was arrested in Concord, New Hampshire and charged with the following offenses: driving while under the influence (second offense), operating after suspension, resisting arrest, assault on a police officer, transporting of a controlled drug (marijuana), possession of marijuana and possession of cocaine. Complaint ¶ 9; Answer ¶ 9; Affidavit of Marcia-Ann Pogar ("Pogar Affidavit") (Docket No. 12) ¶ 4. As a result, he was incarcerated at the Merrimack County Jail, subject to cash bail of \$10,000, from August 26 through September 13, 1989. Complaint ¶¶ 10-11; Answer ¶¶ 10-11. On August 29, 1989, the plaintiff's sister contacted the shipyard on his behalf to request that he be placed on

earned annual leave. Complaint & 12; Answer & 12; Pogar Affidavit & 4. The following day the plaintiff contacted the shipyard directly to make the same request. Pogar Affidavit & 4. The shipyard denied the plaintiff's request and informed him that his absence from work would be regarded as unauthorized. Complaint & 13; Answer & 13. The plaintiff pursued a workplace grievance in connection with the decision on his leave request, but was unsuccessful. Pogar Affidavit & 4.

On October 3, 1989 the service shop superintendent notified the plaintiff of the Navy's proposed decision to terminate his employment because of his "excessive unauthorized absence" from August 28 through September 13, 1989. Complaint & 14; Answer & 14; Pogar Affidavit & 6. After receiving the plaintiff's oral response to the proposed action, the Navy finalized his termination from employment effective December 11, 1989. Complaint & 15; Answer & 15; Pogar Affidavit & 5. It is clear that the sole cause of the plaintiff's dismissal was his absence from work on the dates in question. Defendant's Statement of Material Facts (Docket No. 5) & 6; Plaintiff's Statement of Material Facts (Docket No. 10) & 6.<sup>1</sup> Although the Navy's policy is to grant employees leave for bona fide emergencies, the Navy does not consider incarceration to be a *bona fide* basis for such leave.<sup>2</sup>

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<sup>1</sup> The Navy's position is that there were three distinct reasons for the plaintiff's termination: his arrest in connection with the charges enumerated above, his failure to report for work as scheduled on August 28 without having requested leave in advance or notifying the shipyard as to the reason for his absence on that date, and his unauthorized absence from August 28 through September 13. Defendant's Statement of Material Facts & 6. The plaintiff's position is that the "actual reason" for his dismissal was only the excessive unauthorized absence. Plaintiff's Statement of Material Facts & 6 (citing Defendant's Statement of Material Facts at Exh. 13).

<sup>2</sup> Citing certain findings of fact made by an administrative judge of the Merit Systems Protection Board ("MSPB"), Leary contends that the Navy has granted emergency leave to other shipyard employees who were incarcerated. Exh. 15 to Pogar Affidavit at 4. In rejecting Leary's claim before the MSPB that he had been the victim of disparate treatment, the administrative judge found that one shipyard employee had been granted emergency leave in excess of five days because the employee was incarcerated. *Id.* The administrative judge also found that certain other employees had been granted leave for incarceration of five days or less, but noted that the Navy's policy is not to consider discharging an employee for unauthorized leave of five days or less. *Id.* On the issue of whether the Navy's official personnel policy is to refuse emergency leave for incarceration, Leary has

Pogar Affidavit & 2. According to the Navy's personnel policy, discharge is among the sanctions that may be imposed against an employee who is absent for more than five consecutive work days without authorization. Exhs. 1 and 1A to Pogar Affidavit.

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not met the requirement set forth in Fed. R. Civ. P. 56(e) that he respond with ``specific facts showing that there is a genuine issue for trial" in response to the Navy's assertion that its official policy is to deny such emergency leave requests.

The plaintiff filed an appeal of his termination with the MSPB. After an evidentiary hearing, an administrative judge affirmed the Navy's decision on April 9, 1990.<sup>3</sup> Exh. 15 to Pogar Affidavit. The plaintiff appealed to the full MSPB, which affirmed the decision on January 10, 1992. Exh. 16 to Pogar Affidavit. Pursuant to 5 U.S.C. ' 7702(b)(1), the plaintiff thereafter sought review of his discrimination claim by the Equal Employment Opportunity Commission ('`EEOC'). On August 19, 1993 the EEOC affirmed the determination of the MSPB. Exh. 19 to Pogar Affidavit. Although the EEOC determined that the plaintiff's alcoholism and drug dependency constituted a disability within the meaning of the Rehabilitation Act, it found that the plaintiff's dismissal was not a result of the disability. *Id.* The plaintiff then filed his complaint with this court.

### III. Legal Analysis

Section 504 of the Rehabilitation Act provides that ``[n]o otherwise qualified individual with a disability in the United States ... shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity." 29 U.S.C. ' 794(a). Alcoholism is a disability within the meaning of the Act, *Little v. F.B.I.*, 1 F.3d 255, 257 (4th Cir. 1993), and, for purposes of its present motion, the defendant concedes that the plaintiff is an alcoholic. The defendant contends, however, that the plaintiff is unable to demonstrate that his discharge was solely by reason of his disabling condition.

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<sup>3</sup> Specifically, the administrative judge not only rejected the plaintiff's contention that he had been the victim of disability discrimination, and also found that the plaintiff had failed to prove his allegation that his dismissal was in reprisal for certain union activities, but also rejected the plaintiff's contention that his dismissal was illegal because he had been the victim of disparate treatment by the shipyard. Exh. 15 to Pogar Affidavit. The plaintiff does not pursue his reprisal allegation in his present complaint.

The plaintiff bears the initial burden of making a *prima facie* showing that the adverse employment action was taken solely by reason of the disability, and in the absence of such a showing summary judgment in favor of the employer is appropriate. *Taub v. Frank*, 957 F.2d 8, 10-11 (1st Cir. 1992). Here, the plaintiff contends that he can demonstrate he was fired solely because of his disability, citing the causal link between his alcoholism, his arrest for operating under the influence and related charges, and his subsequent incarceration causing his unexcused absence from work.

The Rehabilitation Act, however, does not automatically protect an employee who is an alcoholic from being discharged when the employee can demonstrate some relationship between the alcoholism and the events precipitating the discharge. For example, the Act ``does not prohibit an employer from discharging an employee for improper off-duty conduct when the reason for the discharge is the conduct itself, and not any handicap to which the conduct may be related." *Wilber v. Brady*, 780 F. Supp. 837, 839 (D.D.C. 1992) (quoting *Richardson v. United States Postal Service*, 613 F. Supp. 1213, 1215-16 (D.D.C. 1985)). Thus, in *Wilber*, the Bureau of Alcohol, Tobacco and Firearms did not violate the Act when it discharged an employee who was convicted of vehicular homicide and driving while intoxicated as the result of an off-duty incident involving a government-owned vehicle, even though the accident was a result of the employee's alcoholism. *Wilber*, 780 F. Supp. at 837-38. And, in *Taub*, an employee who was discharged by the Postal Service for both possessing and distributing heroin at the workplace was not protected from discharge by the Act because, to the extent that his addiction constituted a disability, there was ``too attenuated" a link between the disability and the separate act of distributing the heroin for use by others. *Taub*, 957 F.2d at 11. Although the termination of an employee for excessive absenteeism, when the employee demonstrates that the absenteeism is caused by substance abuse, is termination solely by reason of that substance abuse for purposes of the Rehabilitation Act, *Golson-El v. Runyon*, 812 F. Supp. 558, 560

(E.D. Pa. 1993) (citing *Teahan v. Metro-North Commuter R. Co.*, 951 F.2d 511 (2d Cir. 1991), *cert. denied*, 113 S.Ct. 54 (1992)), an employer does not improperly rely on a disability as the sole basis for the termination when the employer can point to behavior that is not causally related to the disability, *id.*

What precipitated the plaintiff's discharge in this case was his absence from the workplace, a direct result of his inability to post the \$10,000 bail required by the New Hampshire court to secure his appearance at further criminal proceedings in connection with his arrest. Assuming that his alcoholism was the cause of his arrest, the connection between the alcoholism and the discharge is too attenuated to sustain a claim that the plaintiff was discharged solely by reason of his disability.<sup>4</sup> It appears that the plaintiff's alcoholism played a significant role in the incident that led to his arrest. Nevertheless, even viewing the facts in the light most favorable to the plaintiff, any link between the alcoholism and the plaintiff's absence from work is too remote to make out a *prima facie* case that the plaintiff was discharged solely because of his alcoholism.

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<sup>4</sup> It should be noted that this case differs significantly from *Wilber* and *Taub*, which were both cases in which the defendant's criminal conduct itself became the basis for the employee's termination. Here, the plaintiff ultimately entered a plea of guilty to charges of resisting arrest, controlling a vehicle where drugs are kept, possession of cocaine, operating under the influence and operating under revocation. See certified copies of criminal judgments appended as Exh. A to Defendant's Statement of Material Facts. The disposition of the criminal charges, however, did not take place until more than a year after the Navy first proposed discharging the plaintiff, *id.*, and the parties therefore do not contend that the plaintiff's criminal activity was itself a basis for his discharge.

It is therefore unnecessary to address the plaintiff's allegation that his discharge constitutes improperly disparate treatment, based on his contention that other shipyard employees with similar records of unexcused absences were not discharged, or the plaintiff's allegation that by discharging him the shipyard failed to make a reasonable accommodation of his disability as required by section 501 of the Act. *See* 29 U.S.C. ' 791; *Carr v. Reno*, 23 F.3d 525, 528-29 (D.C. Cir. 1994) (affirmative action provisions in section 501 require federal employers to make reasonable accommodation to employee's disability unless agency can demonstrate that accommodation would impose undue hardship). Nor is it necessary for the court to address the defendant's contention that the plaintiff is unable to demonstrate that he is "otherwise qualified" for his position, notwithstanding his disability, within the meaning of section 504. When an employee "commits an act which standing alone disqualifies him from service and is not entirely a manifestation of alcohol abuse," the act itself renders the employee not "otherwise qualified" as that term is used in the Act. *Wilber*, 780 F. Supp. at 839 (quoting *Richardson*, 613 F. Supp. at 1215-16).

Finally, the plaintiff cites *Coletti's Furniture, Inc. v. N.L.R.B.*, 550 F.2d 1292 (1st Cir. 1977), in urging this court to impose upon the defendant the burden of proving that his discharge could not have been caused even in part by his disability. *See id.* at 1294. At issue in *Coletti*, however, were allegations that an employee had been improperly dismissed for union organizing; the case did not arise under the Rehabilitation Act. To impose such a burden on an employer here would be to disregard the language in section 504 prohibiting discharge of an otherwise qualified employee only when it is "solely" by reason of the employee's disability.

Viewing the facts in the light most favorable to the plaintiff, it is plain that his discharge was the result of his unauthorized absence from work, an occurrence that was not solely the result of his

disability. I therefore conclude that the Secretary is entitled to judgment as a matter of law and recommend that the court grant the Defendant's motion for summary judgment.

**NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated at Portland, Maine this 19th day of September, 1994.*

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*David M. Cohen  
United States Magistrate Judge*